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Reality Check: The Need to Repair the Broken System of Delegating Legislative Power Under the National Emergencies Act

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REALITY CHECK: THE NEED TO REPAIR THE BROKEN SYSTEM OF DELEGATING LEGISLATIVE POWER UNDER THE NATIONAL EMERGENCIES ACT

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INTRODUCTION

John Lennon, Paul McCartney, and Steve Jobs have shaped our present-day political discourse in ways that they almost certainly could not have imagined. America met Lennon, McCartney, and the "other" members of the Beatles through their 1964 appearance on the Ed Sullivan Show—a performance that was viewed by approximately 73 million people[1] and that helped legitimize television as an effective means of mass communication.

Steve Jobs introduced America to another transformative means of communication in 2007 through the debut of the iPhone.[2] Originally intended as an iPod capable of making telephone calls,[3] the iPhone brought the Internet to the tips of a user's thumbs. In doing so, it provided a nearly ubiquitous means of instant mass communication to hundreds of millions of consumers.[4]

Television helped convert the United States into a sound-bite society. Ideas, including those in the political space, are now communicated through short, catchy speech designed to represent much broader thoughts or positions.[5] Some have even argued that Donald Trump's presidency is a byproduct of his fourteen-year stint as star of *The Apprentice* and *The Celebrity Apprentice* reality television shows. That exposure, in the words of one commentator, "presented Trump as a calm, infallible decision-maker, who listened to others but came to his own conclusions, [and] greatly emphasized his success" to a significant national audience.[6]

As society further adopted devices like the iPhone, attention spans dwindled,[7] and communication in short bursts became even more prevalent. Applications like Facebook and Twitter made rapid, cursory

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1 *America Meets the Beatles on the Ed Sullivan Show*, HISTORY, https://www.history.com/this-day-in-history/america-meets-the-beatles-on-the-ed-sullivan-show [https://perma.cc/5BJB-HBNX] (last updated Dec. 13, 2018).

2 Cal Newport, *Steve Jobs Never Wanted Us to Use our iPhones Like This*, N.Y. TIMES (Jan. 25, 2019), https://www.nytimes.com/2019/01/25/opinion/sunday/steve-jobs-never-wanted-us-to-use-our-iphones-like-this.html [https://perma.cc/G3DE-SFXH].

3 *Id.*

4 *Global Apple iPhone Sales from 3rd Quarter 2007 to 4th Quarter 2018*, STATISTA, https://www.statista.com/statistics/263401/global-apple-iphone-sales-since-3rd-quarter-2007 [https://perma.cc/MSH6-MHEW] (last visited Feb. 21, 2019).

5 Given President Trump's gift of spectacle and flair, perhaps television is more responsible for his presidency than for any other to which it may have contributed.

6 Bert Gambini, *Realty TV Played Key Role in Taking Trump from 'Apprentice' to President*, UBNOW (Mar. 5, 2018), http://www.buffalo.edu/ubnow/stories/2018/03/gabriel-trump-reality-tv.html [https://perma.cc/H66G-8SRD] (considering the research of psychologist Shira Gabriel).

7 Kevin McSpadden, *You Now Have a Shorter Attention Span Than a Goldfish*, TIME (May 14, 2015), http://time.com/3858309/attention-spans-goldfish [https://perma.cc/J5RX-GEVT].

interactions common—so much so that some of the most important discourse is now conducted in 280-character increments.[8] News is made and consumed in bursts, and political conversation frequently is driven not by depth of dialogue, but by a simplified message compressed for easy consumption.

Hotly debated on those new mediums is the legality of President Trump's effort to fund a border wall[9] dividing the United States from Mexico through unilateral emergency action.[10] But no matter the result of that controversy—a dispute on which this Article takes no position—there remains a more difficult question driven not by sound bites and new media, but by ancient parchment and principles articulated centuries ago.

Assuming, for the sake of argument, that President Trump lacks constitutional authority to unilaterally order the construction of the Wall, the issue becomes whether Congress has delegated its constitutional authority to the executive branch to independently commission construction of that barrier. No matter how that question is answered—again, this Article does not wade into that controversy— the present debate demands that the process by which legislative power is delegated to the executive branch by virtue of an emergency declaration quickly be revisited.

When it was enacted in 1976, the measure by which Congress delegated emergency legislative authority to the executive branch—the National Emergencies Act[11]—allowed Congress to revoke an emergency

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8 Hayley Tsukayama, *Twitter is Officially Doubling the Character Limit to 280*, WASH. POST (Nov. 7, 2017), https://www.washingtonpost.com/news/the-switch/wp/2017/11/07/twitter-is-officially-doubling-the-character-limit-to-280 [https://perma.cc/PC2F-BQQA].

9 I will generally refer to the border wall simply as "the Wall." References to the Wall will also pertain to a sea-to-sea structure. The 2016 Republican National Committee Platform demanded a wall running the entire length of the southern border, from San Diego to Brownsville, Texas. *See Republican Platform 2016*, at 25–26, REPUBLICAN NAT'L COMM., https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL[1]-ben_1468872234.pdf [https://perma.cc/WCV3-XZMB]. Although his 2019 request to fund such a barrier sought monies at this point in time for "only" a 234-mile stretch of that project at unspecified locations on the border, *see* Letter from Russell T. Vought, Acting Dir., Exec. Office of the President, Office of Mgmt. & Budget, to Richard Shelby, Chairman, Comm. on Appropriations, U.S. Senate 1 (Jan. 6, 2019), https://www.whitehouse.gov/wp-content/uploads/2019/01/Final-Shelby-1-6-19.pdf [https://perma.cc/ZL7X-YWEJ], President Trump has not categorically retreated from the idea that, whenever it is completed, the wall must cover every inch of the southern border, *see Republican Platform 2016*, *supra*, at 26; *cf.* Christal Hayes, *'Not a 2,000-Mile Concrete Structure from Sea to Sea': Is Trump Scaling Back Border Wall Plan?*, USA TODAY (Jan. 20, 2019, 7:23 PM), https://www.usatoday.com/story/news/politics/2019/01/19/trump-wall-wont-2-000-mile-concrete-structure-sea-sea/2627378002 [https://perma.cc/4WHF-GZQL].

10 Toluse Olorunnipa & Erik Wasson, *Trump Says He Can Declare National Emergency to Build Wall*, BLOOMBERG (Jan. 5, 2019, 9:33 AM), https://www.bloomberg.com/news/articles/2019-01-04/trump-says-he-can-declare-national-emergency-to-build-wall.

11 *See* National Emergencies Act, Pub. L. No. 94-412, 90 Stat. 1255 (1976) (codified at 50 U.S.C. §§ 1601–1651 (2012)).

declaration by simple majority vote.[12] A few years later, however, the Supreme Court's decision in *I.N.S. v. Chadha*[13] held this mechanism to be unconstitutional, thus allowing the President to veto a congressional revocation of an emergency declaration.[14] To simply *retain its own legislative authority*, Congress suddenly was required to muster the support of two-thirds of the members of each chamber to override that executive declination.

Part I of this Article will explore the constitutional and statutory sources of executive power, respectively, before detailing in Part II the unintended consequences of Congress's delegation of legislative power to the executive branch through the National Emergencies Act. Part III will propose a practical, simple, and sturdy repair to the National Emergencies Act that will limit the potential for the abuses warned of by Supreme Court Justice Robert Jackson decades ago. Instead of providing a grant of emergency legislative authority to the executive branch that may only be *revoked* by legislative action, Congress should revise the law to provide a finite grant of legislative authority to the executive branch that may only be *extended* through legislative approval of an executive emergency declaration within a short period of time after that declaration is made.

I. SOURCES OF EXECUTIVE POWER

A. *Constitutional Executive Power*

Our review naturally and logically begins with a discussion of the breadth of executive power under the Constitution. In basic terms, a constitution is "[t]he fundamental and organic law of a country or state that establishes the institutions and apparatus of government, defines the scope of governmental . . . powers, and guarantees individual civil rights and civil liberties."[15] Said more simply, a constitution can be thought of as a bedrock or a foundation for government. By its own intelligent design, the federal Constitution may not be easily changed; the core rules of government are intended to evolve slowly and carefully, if at all, to provide stability to society.[16]

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12 *See id.* § 202(a)(1), 90 Stat. at 1255 ("Any national emergency declared by the President in accordance with this title shall terminate if Congress terminates the emergency by concurrent resolution . . . .").

13 462 U.S. 919 (1983).

14 *See id.* at 952–59.

15 *Constitution*, BLACK'S LAW DICTIONARY (10th ed. 2014).

16 *See* U.S. CONST. art. V.

This is not, however, to say that the Constitution is not sometimes subject to interpretation. For decades, if not for centuries, there have been disputes about the meaning and extent of such things as constitutional protections for the freedom of speech, for the bearing of arms, from illegal search and seizure, and for the due process of law. One obvious way to resolve many such disputes is to look at the intent of the Framers of the Constitution.

Perhaps the most significant influence over those who built—or framed—the Constitution was exerted by seventeenth-century English philosopher John Locke, who articulated his views of the power and extent of government in his *Two Treatises on Government*. According to Locke, the bond of a government to its people is "conjugal" in a sense similar to the relationship "between man and woman."[17] "Conjugal society," in Locke's words, "is made by a voluntary compact between man and woman,"[18] and is accomplished, in spite of the "sometimes . . . different wills" of "husband and wife,"[19] to support the "common concern" of the "continuation of the species."[20]

Similar to that interpersonal relationship, thought Locke, was the interaction of a government and its people. To bridge the inevitable differences in will and understanding of the critical mass of people who sought to unite into a single society required both the rule and the balance of law[21] in what Locke aptly referred to as a "commonwealth"[22]; that is, a sharing of wealth for the benefit of all. The "great end of . . . entering into society"—namely, the "enjoyment of [one's] properties in peace and safety"—were accomplished through "the laws established in that society."[23]

Perhaps it is to that phrase that we owe modern references to the United States as a nation of laws and as a society founded upon the rule of law.[24] Perhaps it was, however, that Locke instilled in the Framers of

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17 JOHN LOCKE, TWO TREATISES OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 133 (Ian Shapiro ed., Yale Univ. Press 2003) (1690).

18 *Id.*

19 *Id.* at 135.

20 *Id.* at 133.

21 *Id.* at 137–38.

22 *Id.* at 157–58.

23 *Id.* at 158.

24 History attributes to John Adams the famous saying that we are "a government of laws, not of men." *See, e.g.*, JOHN ADAMS & JONATHAN SEWELL, NOVANGLUS AND MASSACHUSETTENSIS, OR POLITICAL ESSAYS PUBLISHED IN THE YEARS 1774 AND 1775 ON THE PRINCIPAL POINTS OF CONTROVERSY BETWEEN GREAT BRITAIN AND HER COLONIES 84 (1819); MASS. CONST. art. XXX, pt. 1. The origin of that point is not as important as its substance. Our society "depend[s] upon compliance with the rule of law to bring order from chaos," to provide "consistency of result for all persons," and to afford "predictability in the result of the manner in which we conduct our daily affairs." Weaver v. Credigy Receivables, Inc., No. 10-04-00331-CV, 2005 WL 23681, at *2

our republic the concept that power is the "right to direct how the force of the commonwealth shall be employed for preserving the community and the members of it."[25] And perhaps it also was Locke's concern with respect to the concentration of authority in the hands of the few, and his belief that "legislative and executive power . . . be separated,"[26] that motivated the Framers of the Constitution to avoid consolidating power in a single entity:

> [B]ecause it may be too great temptation to human frailty, apt to grasp at power, for the same persons who have the power of making laws to have also in their hands the power to execute them, whereby they may exempt themselves from obedience to the laws they make, and suit the law, both in its making and execution, to their own private advantage . . . .[27]

The Framers, of course, took a similar approach in splitting power between three co-equal branches of government, spelling out the respective roles and powers of the legislative, executive, and judicial branches in the first three articles of the Constitution, respectively.[28] The reference to the legislative branch first in that compact suggests that the Framers, although not necessarily in lockstep with the view of the legislature as "[t]he supreme power of the commonwealth,"[29] saw that branch as essential and co-equal with the executive and judicial arms of the sovereign.[30]

In that vein, the Framers placed control of critical, if not momentous, decisions for such things as the power to declare war with Congress.[31] The power to raise and support armed and naval forces rests solely with Congress,[32] as does the responsibility to "make all Laws."[33] All bills for raising revenue must originate in the House of Representatives[34]—the part of Congress to which the populace is most closely connected.[35] More importantly, the Framers explicitly vested Congress with the "power of

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(Tex. App. Jan. 5, 2005) (Gray, C.J., dissenting). "As a nation of laws, the whims of those in power are *supposed* to yield to the application of the rules." *Id.*

25 LOCKE, *supra* note 17, at 164.

26 *Id.*

27 *Id.* Locke believed that to permit the usurpation of power would be to promote "tyranny," which he defined as "the exercise of power beyond right." *Id.* at 188.

28 *See* U.S. CONST. arts. I–III.

29 *See generally* LOCKE, *supra* note 17, at 158.

30 *But see* THE FEDERALIST NO. 51, at 350 (James Madison) (Jacob E. Cooke ed., 1961) ("[I]n republican government the legislative authority, necessarily, predominates.").

31 U.S. CONST. art. I, § 8, cl. 11.

32 *Id.* art. I, § 8, cls. 12–13.

33 *Id.* art. I, § 8, cl. 18.

34 *Id.* art. I, § 7, cl. 1.

35 *See id.* art. I, § 2.

the purse," commanding that "No Money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law."[36]

With the executive branch, the Framers placed different and fewer responsibilities. Consistent with Locke's theories,[37] the Framers vested in the presidency leadership of the armed forces,[38] pardon power,[39] appointment power,[40] and the responsibility to "take Care that the Laws be faithfully executed."[41]

What arguably is that bare articulation of executive power has given rise to differences of opinion as to the strength and authority of the executive branch. The discordant theories of two Presidents from the early twentieth century illustrate this point well.

On the one hand, Theodore Roosevelt saw the presidency as an office of inherent power, limited only by the constraints placed upon it by the Constitution. According to Roosevelt, "every executive officer . . . [is] a steward of the people," meaning that "what [is] imperative [and] necessary for the Nation [should] be done by the President" as a matter of duty, absent constitutional or legislative prohibition.[42]

On the other hand, Roosevelt's successor, William Howard Taft, had a more constrained and arguably conservative view of executive power. Unlike Roosevelt, who believed the Constitution's discussion of the executive branch provided for expansive presidential power, Taft saw the Framers' articulation of executive authority as limited and limiting. That is, Taft viewed executive power as something derived from the Constitution and *only* from the Constitution. In his opinion, there is "no undefined residuum of [executive] power" in the Constitution, and "the President can exercise no power which cannot be fairly and reasonably traced to some specific grant of power or justly implied and included within such express grant as proper and necessary to its exercise."[43] Those grants of authority may be made through either the Constitution or an act of Congress passed in accordance with the Constitution's procedural requirements.[44]

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36 *Id.* art. I, § 9, cl. 7.

37 *See generally supra* text accompanying notes 17–26; note 27 and accompanying text.

38 U.S. CONST. art. II, § 2, cl. 1.

39 *Id.*

40 *Id.* art. II, § 2, cl. 2.

41 *Id.* art. II, § 3.

42 THEODORE ROOSEVELT, AN AUTOBIOGRAPHY 357 (Charles Scribner's Sons 1926) (1913).

43 WILLIAM HOWARD TAFT, OUR CHIEF MAGISTRATE AND HIS POWERS 139–40 (1916).

44 Perhaps a better way of explaining the dichotomy between Roosevelt and Taft would be to say that Roosevelt saw the Constitution's articulation of executive power as limiting an inherent, broad authority of the executive to act, whereas Taft thought executive authority to be limited to only the powers specifically articulated in the Constitution.

Important to the absence of an explicit grant of executive emergency power in the Constitution is the historical context under which that compact was conceived. The Constitution was a response to what its drafters believed to have been the tyranny under which colonial America had been ruled by its English master. To avoid the confiscation of power by a single person, the Framers divided authority among three co-equal parts of government. And, to further protect from tyranny, the Framers placed responsibility for what arguably are the most serious and important of powers—namely, the responsibility to make laws,[45] the authority to raise armed forces and declare war,[46] and the control of the treasury[47]—with the part of government comprised of the largest group of people: Congress.[48]

Moreover, although "[t]he Constitution was adopted in a period of grave emergency,"[49] the framers specifically chose *not* to vest with the executive with broad power to unilaterally react to exigency, let alone to the whim or caprice of the moment of the day.[50] In fact, under the Constitution—or, put differently, under the letter of the bedrock law of our society—a President's power is limited to leadership of the armed forces,[51] the granting of pardons,[52] the making of appointments,[53] and the responsibility to "take Care that the Laws be faithfully executed."[54]

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45 U.S. CONST. art. I, § 8, cl. 18.

46 *See id*. art. I, § 8, cls. 11–13.

47 *See id.* art. I, § 9, cl. 7.

48 *Compare id.* art. I, § 2, cl. 3 ("Representatives . . . shall be apportioned among the several States . . . according to their respective Numbers . . . ."), *and id.* art I., § 3, cl. 1 ("The Senate . . . shall be composed of two Senators from each State . . . ."), *with id*. art. II, § 1, cl. 1 ("The executive Power shall be vested in a President . . . ."), *and id.* art. III, § 1 ("The judicial Power . . . shall be vested in one supreme Court, and in such inferior Courts as the Congress may from time to time ordain and establish.").

49 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S 398, 426 (1934).

50 There perhaps is one exception to this rule. Some believe that the Constitution permits the President to suspend the privilege of the writ of habeas corpus in a time of rebellion or invasion, when required to secure the public safety. *See* S. JOURNAL, 37th Cong. 1st Sess. 12–13 (1861) (containing President Lincoln's remarks in support of the Executive's ability to suspend the writ of habeas corpus without congressional authorization). *But see* Hamdi v Rumsfeld, 542 U.S. 507, 562 (2004) (Scalia, J., dissenting) ("Although this provision does not state that suspension must be effected by, or authorized by, a legislative act, it has been so understood, consistent with English practice and the Clause's placement in Article I." (citations omitted)); *Ex parte* Merryman, 17 F. Cas. 144, 151–152 (C.C.D. Md. 1861) (Taney, C.J.) (rejecting President Lincoln's suspension of the writ of habeas corpus on the theory "[t]hat the president, under the constitution of the United States, cannot suspend the privilege of the writ of habeas corpus, nor authorize a military officer to do it"). *See generally* U.S. CONST. art. I, § 9, cl. 2.

51 U.S. CONST. art. II, § 2, cl. 1.

52 *Id.*

53 *Id.* art. II, § 2, cl. 2.

54 *Id.* art. II, § 3.

Nothing in the Constitution allows the executive to take from Congress the authority to, for example, make laws and control the public purse.

Indeed, the Constitution's "grants of power were determined . . . in the light of [the] emergency" during which that document was created, and "they are not altered by emergency."[55] "Emergency does not *create* power,"[56] but instead merely "furnish[es] the occasion for the *exercise* of power."[57]

B. *Statutory Executive Power*

Taft's view of the origins of executive power—that it is derived from the Constitution and *only* from the Constitution[58]—leads to the alternative source of that authority, namely, an act of Congress.[59] Through the presidencies of Roosevelt and Taft—and, in fact, through the first three-quarters of the twentieth century—presidential emergency authority had been a murky proposition. At that point, emergency laws and procedures were a "disarr[a]y" that had resulted in a majority of Americans then alive living "their entire lives under emergency rule."[60]

In response to that "dangerous state of affairs,"[61] the Senate created the Special Committee on National Emergencies and Delegated Emergency Powers to review the executive exercise of emergency power. Through three years of work, the Special Committee recognized that the haze in which emergency power was applied came about as "a direct result of Congress' failure to establish effective means for the handling of emergencies and its willingness to defer to Executive branch leadership."[62] During four decades marked by, among other things, significant wars, "Congress, through its own actions ha[d] transferred awesome magnitudes of power to the Executive without ever examining

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55 Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 425 (1934).

56 *Id.* at 472 (Sutherland, J., dissenting) (emphasis added).

57 *Id.* (emphasis added).

58 *Supra* note 43 and accompanying text; text accompanying note 44.

59 At this point, this Article takes no firm position with respect whether the Constitution vests the President with authority to declare a national emergency, let alone whether the President has the constitutional authority to declare a national emergency for the purpose of procuring funding for a domestic project such as a border wall. For that discussion, see *infra* Part III.

60 S. COMM. ON GOV'T OPERATIONS & S. SPECIAL COMM. ON NAT'L EMERGENCIES & DELEGATED EMERGENCY POWERS, 94TH CONG., NAT'L EMERGENCIES ACT SOURCE BOOK 33 (Comm. Print 1976) [hereinafter SOURCE BOOK].

61 That "dangerous state of affairs" came to a head as a result of "the United States' experience in the Viet Nam War and the incursion into Cambodia," through which "Americans [were committed by the President] to warfare without any Congressional declaration of a state of war." *Id.* at 33–34.

62 *Id.* at 33.

the cumulative effect of that delegation of responsibility."[63] Moreover, the Special Committee observed, Congress had "tolerated and condoned Executive initiatives without fulfilling its own constitutional responsibilities," including the duty to "in large measure make the law."[64]

Based on those considerations, the Special Committee urged the passage of the National Emergencies Act to "check[] the growth of Executive power and [to] return[] the United States to normal peacetime processes."[65] That measure, thought the Special Committee, was "vital" to "insuring that the United States travel[ed] a road marked by legislative oversight and carefully constructed legal safeguards."[66]

So murky was the state of emergency authority at that time that Special Committee investigators had only a "rudimentary state of knowledge of emergency laws and procedures."[67] Quickly, however, the Special Committee "discovered that disorder enveloped the whole field of emergency statutes and procedures,"[68] and that four national emergencies—one of which dated to the banking crisis of 1933—remained in force.[69] The standing nature of those states of emergency was significant because, under then-existing statutes, any declaration of emergency powers triggered "extraordinary" executive authority that included the powers to, among other things, detail the armed forces "'to assist in military matters' in any foreign country," declare any part of the United States a military zone, and "use the militia or armed forces to suppress 'conspiracy.'"[70]

The Special Committee also reiterated that "our system of government 'is a balanced power structure,'" and that "Executive power to act is a variable" depending on either the President's independent powers (drawn from the Constitution) or the will of the people (discerned from an express or implied authorization of Congress).[71] That is, "[t]he President's power, if any, . . . must stem either from an act of Congress or from the Constitution itself."[72]

By the early 1970s, Congress realized that it had "allowed the Executive to usurp" the Constitutional role of the legislative branch in the emergency realm, and that it was necessary to "reassert the principle that

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63 *Id.*

64 *Id.*

65 *Id.*

66 *Id.*

67 *Id.* at 34.

68 *Id.* at 35.

69 *Id.*

70 *Id.* (citations omitted).

71 *Id.* at 38 (quoting Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 634–38 (1952) (Jackson, J., concurring)).

72 *Youngstown*, 343 U.S. at 585 (majority opinion).

emergency powers are available only for brief periods when Congress is unable to act."[73] In fact, by then it was argued that the gravest—and paradoxically continuing—national emergency at that time was one that had "throw[n] our whole system of constitutional government into jeopardy."[74] That emergency was characterized as "the atrophy of Congress."[75]

So it was that the Special Committee sought "the decisive recovery of legislative powers"[76] through legislation "establish[ing] procedures for the handling of any future national emergency."[77] On August 22, 1974—within weeks of President Richard Nixon's Watergate-fueled resignation,[78] and shortly after the end of American involvement in the undeclared Vietnam War[79]—the Special Committee introduced the National Emergencies Act to the Senate.[80] The original bill provided for the termination of existing executive national emergency powers and authorities, for "[c]ongressional review of further national emergencies," and for "[c]ongressional oversight of and Executive accountability for actions taken" under the guise of emergency authority.[81] It passed the Senate in a substantively identical form and without dissent in October 1974.[82] Following minor technical amendments, the House of Representatives and the Senate agreed on a final version of "this significant piece of legislation" by early 1976 with "universal support."[83] What became the National Emergencies Act[84] authorized the President to

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73 *See* SOURCE BOOK, *supra* note 60, at 16.

74 *Id.* at 17.

75 *Id.*

76 *Id.*

77 *Id.* at 40.

78 The Watergate scandal, of course, arose from the efforts of President Nixon's administration to cover up its involvement in a break-in at the Democratic Party Headquarters at the Watergate office complex in Washington, D.C., in 1972. The attempted cover-up prompted a congressional investigation that revealed numerous abuses of power by the Nixon administration, which in turn prompted Nixon's resignation on August 9, 1974. *See* Carroll Kilpatrick, *Nixon Resigns*, WASH. POST, Aug. 9, 1974, at A01, https://www.washingtonpost.com/wp-srv/national/longterm/watergate/articles/080974-3.htm [https://perma.cc/DYZ5-7NQF]. The National Emergencies Act reflected those times and the resulting legislative desire to curb opportunity for expansion and concomitant abuse of executive powers. *See* SOURCE BOOK, *supra* note 60, at 44, 51.

79 That conflict—which included an incursion into Cambodia without Congressional authorization—and the Watergate "abuses . . . led Congress to assume a more prominent role" in demanding "increased Executive accountability." *See* SOURCE BOOK, *supra* note 60, at vii, 3. Congress also sought "to make the Executive accountable for his [or her] actions and to restore Congress as an equal partner in government" and to "restore the constitutional balance between the Executive and Legislative branches of [the federal] government." *Id.*; *see also id.* at 14.

80 *Id.* at 40.

81 *Id.*

82 *See id.* at 40–41.

83 *Id.* at 41–42.

84 50 U.S.C. §§ 1601–1651 (2012).

declare a national emergency, but only in circumstances in which such a declaration had been authorized by Congress.[85]

II. THE LAW OF UNINTENDED CONSEQUENCES

No matter the result of the Wall debate—that is, irrespective of whether the national emergency declaration in support of the Wall project passes legislative and judicial muster—the problem remains that Congress's recapture of its delegated authority is now much more difficult than originally intended. When the National Emergencies Act was enacted in 1976, a joint resolution of Congress was not subject to a presidential veto, meaning that if a bare majority of the members of each House voted to annul a declaration of a national emergency, that declaration was deemed terminated.

In 1983, however, the Supreme Court ruled that a declaration of even one House of Congress is subject to a presidential veto when taking action that is "essentially legislative in purpose and effect."[86] As the logic went, a resolution exercising power under a statute is a legislative act, and a legislative act is subject to the Constitution's procedural requirements, which afford opportunity for a presidential veto.[87]

Because Congress may terminate a presidential emergency declaration only through a joint resolution, and because a joint resolution in this context is a legislative act, such a resolution necessarily is subject to a presidential veto. And, although the drafters of the National Emergencies Act intended for presidential emergency authority to be

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85 *Id.* § 1621. In imagining what became the National Emergencies Act, the Special Committee "paid close attention to court decisions," including the Supreme Court's ruling in *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579 (1952). *See* SOURCE BOOK, *supra* note 60, at 38. At bottom, *Youngstown* stood for the proposition that if there is a statute governing the exercise of Executive power, then "the Executive is obliged to use th[at] statutory remedy." SOURCE BOOK, *supra* note 60, at 24.

The circumstances in which Congress has authorized the exercise of emergency executive power may generally be grouped into six categories: public health; land management; military and national defense; the federal workforce; asset seizure, control, and transfer; and international relations. *See* BRENNAN CTR. FOR JUSTICE, A GUIDE TO EMERGENCY POWERS AND THEIR USE 3–42 (2019), https://www.brennancenter.org/sites/default/files/legislation/AGuideToEmergencyPowersAndTheirUse_2.13.19.pdf [https://perma.cc/HY5U-TSAT]. Of principal concern to the Wall issue is the "military and national defense" category, wherein Congress has conferred upon the President the power to, among other things, authorize military construction projects "necessary to support [emergency] use of the armed forces." *See* 10 U.S.C. § 2808(a) (2012 & Supp. V 2017); *see also* Declaring a National Emergency Concerning the Southern Border of the United States, Proclamation 9844, 84 Fed. Reg. 4949 (Feb. 15, 2019) (invoking 10 U.S.C. § 2808(a) in conjunction with the President's national emergency declaration). Again, though, neither the merits nor the legality of the Wall issue is considered by this Article.

86 Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983).

87 *See id. See generally* U.S. CONST. art. I, § 7, cls. 2–3.

authorized only upon the consent of a majority of members of each House of Congress, the evolution of the law since the Act's enactment has yielded a bizarre situation in which Congress likely must override a presidential veto to retain legislative authority and constrain a President's use of emergency powers. That is, while the National Emergencies Act was intended to authorize emergency executive action only *upon the approval* of a majority of members of each House of Congress, it now permits emergency executive action *without the disapproval* of two-thirds of the members of each such House.[88]

Regardless of the outcome of the Wall controversy, the means by which Congress authorizes executive retention of the legislative authority it has delegated on the basis of a national emergency declaration is something Congress should revisit sooner rather than later. On the one hand, emergency power is designed to address fluid, emergent, acute, and unexpected situations.[89] To suggest that (potentially lethargic) congressional approval is required to legitimately react to such

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88 *Cf. Chadha*, 462 U.S. at 952.

89 Congress did not define "national emergency," but that approach was almost certainly intentional. That is because to define a national emergency would be to limit the desired flexibility and further constrain presidential emergency power already cabined through the National Emergencies Act. Historically, a national emergency has been declared in response to an unexpected, sudden situation. Examples of this include: blocking trade with Iran shortly after the U.S. embassy in that country was invaded; prohibiting transactions with Iraq immediately after its invasion of Kuwait; responding to the terrorist attacks on September 11, 2001; and addressing an influenza epidemic. *See* BRENNAN CTR. FOR JUSTICE, DECLARED NATIONAL EMERGENCIES UNDER THE NATIONAL EMERGENCIES ACT, 1978–2018, https://www.brennancenter.org/sites/default/files/analysis/NEA%20Declarations.pdf [https://perma.cc/N6CF-TGYR] (last visited Mar. 21, 2019).

In any event, there are strong hints as to the characteristics that a true national emergency might have. For example, the Supreme Court has suggested, but not explicitly stated, that an "emergency" is an unforeseeable condition, namely a "disaster" such as "fire, flood, or earthquake." Home Bldg. & Loan Ass'n v. Blaisdell, 290 U.S. 398, 440 (1934). The incorporation of urgency and suddenness in this definition of an emergency is logical, given the Court's broader view of emergency powers. "Emergency," the Court observed, "does not create power . . . or remove or diminish the restrictions imposed upon power granted or reserved." *Id.* at 425. Rather, the Court reasoned, "emergency [merely] afford[s] a reason for the exertion of a living power already enjoyed." *Id.* (quoting Wilson v. New, 243 U.S. 332, 348 (1917)).

The Court is not alone in its view that an "emergency" must be abrupt. Dictionaries, of course, serve as reference sources for English and other languages, and for that reason courts have deemed dictionary definitions to be useful guides in determining the meaning of statutory language. *See, e.g.*, MCI Telecomms. Corp. v. Am. Tel. & Tel. Co., 512 U.S. 218, 225 (1994). At least one dictionary current at the time the National Emergencies Act became law characterized an "emergency" as "an unforeseen combination of circumstances or resulting state that calls for immediate action." *Emergency*, WEBSTER'S NEW COLLEGIATE DICTIONARY 372 (1974). Consequently, at least one scholar has written to Congress explaining an emergency situation has at least three aspects: (1) a "temporal character," inasmuch as its nature is "sudden, unforeseen, and of unknown duration"; (2) "dangerous and threatening to life and well-being"; and (3) circumstances requiring "immediate action." HAROLD C. RELYEA, CONG. RESEARCH SERV., 98-505 GOV, NATIONAL EMERGENCY POWERS 4 (2007).

circumstances would arguably be at odds with the purpose of conferring emergency powers.

On the other hand, the opportunity for the abuse of such powers grew quietly, but dramatically, since the National Emergencies Act was passed, and Congress should revisit the mechanism by which it confers such power.[90] This is perhaps one of the most dangerous aspects of any national emergency declaration: congressional oversight of a President's exercise of what are essentially legislative powers—authority delegated to the executive branch by act of Congress—becomes controlled by a critical mass of the *minority* in each House. Support not from a majority of each House, but from only one-third-plus-one member of each such body, essentially allows the Chief *Executive* to wield *legislative* power that was effectively delegated by less than a majority of each House of Congress.

III. THE REPAIR

In its current form, the National Emergencies Act delegates power upon request of the executive branch unless and until Congress—subject, incredibly, to a presidential veto[91]—affirmatively reclaims that authority. This arrangement—in which power is transferred unless Congress acts to recover it—is similar to what this Article will call "punt" laws.

To punt, of course, is to abdicate control. Accordingly, a punt law is one in which the enacting legislative body essentially seeks to disclaim responsibility for actions taken under authority conferred by that body. There generally are two instances where a legislative body wishes not to be responsible for the authority that it has delegated.

The first frequently occurs in the context of pay raises for elected officials. Supporting a salary increase is dangerous business for any politician of ambition, and such raises sometimes are based on a recommendation by an independent body tasked by a legislature with evaluating lawmaker compensation and offering a proposals for adjusting it. The terms of the legislation creating that body typically provide that the recommendation of the independent body takes effect unless modified or abrogated by the subject legislature.[92] This structure affords legislators

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90 Perhaps one way to revisit that issue would be to include an opportunity for congressional affirmation. That is, Congress may wish to continue to endow the executive with authority to quickly react to emergency situations, but provide such a delegation expires absent the approval of a majority of the members of Congress within a relatively short time period (for example, two weeks or one month).

91 *Supra* text accompanying notes 86–88.

92 *See, e.g.*, Act of Apr. 13, 2015, 2015 N.Y. Laws, ch. 60, Part E; *see also* N.Y. STATE COMM'N ON LEGISLATIVE, JUDICIAL, & EXEC. COMP., nyscommissiononcompensation.org [https://perma.cc/UFZ3-ADJ9] (last updated Nov. 17, 2016).

political cover for any pay raise the independent body recommends. That is, they are free to disavow responsibility for that wage growth because they are relieved of the burden of voting in favor of the recommended the salary increase.

The second common instance of a legislative punt involves policy determinations where the legislature lacks either the expertise or the interest to reach such decisions on its own. The separation of powers doctrine permits a legislature broad leeway in delegating its regulatory authority to an executive agency in administering the law enacted by that legislature.[93] An agency may be clothed with powers expressly and impliedly conferred by an enabling statute passed by a legislature, but that agency may not adopt regulations or rules that go beyond the boundaries of the enabling legislation.[94] Said differently, an agency may enact rules and regulations consistent with the parameters of the legislation authorizing it to act, so as to relieve the legislature from the responsibility of making rules it may have neither the time nor the expertise to create.

The National Emergencies Act is not reflective of such a punt. Congress initially sought to retain control of the authority it conferred upon the executive branch through a simple-majority vote.[95] But, as noted, the necessary threshold to reclaim that power changed dramatically in 1983 when the Supreme Court's decision effectively allowed the President to veto a joint resolution terminating a national emergency.[96] The question now is how the legislative branch may recapture its constitutionally delegated authority from the executive branch.

A. *The Practical Solution*[97]

1. 50 U.S.C. § 1622(a)

The means by which a national emergency declaration can be terminated are set forth in 50 U.S.C. § 1622(a). In its current form, the pertinent part of that statute is as follows:

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93 *See* Util. Air Regulatory Grp. v. Envtl. Prot. Agency, 573 U.S. 302, 327 (2014).

94 *See id.* at 325–26.

95 *See* discussion *supra* Section I.B.

96 *See* Immigration & Naturalization Serv. v. Chadha, 462 U.S. 919, 952 (1983); *supra* text accompanying notes 86–88.

97 In this Section of the Article, proposed subtractions from statutes are noted in "strikeout" text (e.g., ~~subtraction~~), while proposed additions to statutes are noted in capital letters (e.g., ADDITION).

> (a) Termination methods
>
> Any national emergency declared by the President in accordance with this subchapter shall terminate if—
>
> (1) there is enacted into law a joint resolution terminating the emergency; or
>
> (2) the President issues a proclamation terminating the emergency.[98]

Absent a presidential termination of a national emergency, Congress may revoke such a declaration only if it enacts a joint resolution terminating that emergency. Now, unlike when § 1622 was enacted, that joint resolution is subject to defeat by a presidential veto.[99] Accordingly, in its present shape, congressional termination of a national emergency declaration requires a veto-proof, two-thirds supermajority[100]—far in excess of the simple majority Congress envisioned when it provided for its powers to be delegated.

The simplest solution is to modify the National Emergencies Act such that a presidential declaration of a national emergency is not self-executing and essentially effective until Congress defeats the declaration, but self-defeating and, following a short grace period, essentially ineffective until Congress approves of it. That is, to protect the legislature's grip on its own constitutional authority, the relevant parts of § 1622(a) should provide as follows:

> (a) Termination method
>
> Any national emergency declared by the President in accordance with this subchapter shall terminate ~~if~~ —
>
> (1) UNLESS there is enacted into law a joint resolution ~~terminating~~ EXTENDING the emergency WITHIN 30 DAYS OF THAT DELCARATION; or
>
> (2) IF the President issues a proclamation terminating the emergency; OR
>
> (3) IMMEDIATELY, IF THE PRESIDENT, OR A PRIOR SITTING PRESIDENT, PREVIOUSLY DECLARED AN IDENTICAL OR SUBSTANTIVELY SIMILAR NATIONAL EMERGENCY WITHIN SIX MONTHS OF THE MAKING OF THE INSTANT NATIONAL EMERGENCY DECLARATION.[101]

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98 50 U.S.C. § 1622(a) (2012).

99 *See supra* text accompanying notes 95–96.

100 *See* U.S. CONST. art. 1, § 7, cl. 3.

101 A paraphrase of a decades-old observation is appropriate here: "I shall not today attempt to further define" the phrase "substantively similar" as it is used in these proposed revisions to the National Emergencies Act. "[P]erhaps I could never succeed in intelligibly doing so," but I suppose

These proposed modifications—which surely could be refined by those skilled art of drafting legislation—target two significant points.

First, the modifications proposed to subsection (1) automatically terminate a national emergency following a short grace period (in this proposal, thirty days) designed to permit Congress a reasonable amount of time to gather, to debate the declaration, and to act on the declaration. The thirty-day period is recommended to balance the need to allow Congress a sufficient time to gather in the event a large-scale catastrophe or cataclysmic event with the necessity of limiting unchecked executive taking of legislative power.

Second, and just as important (and, perhaps, inartfully), the proposed addition of subsection (3) is designed to prevent executive "shenanigans" to create a "backdoor" national emergency. Even with the automatic termination of a national emergency absent Congressional action extending that emergency, an executive theoretically could frustrate legislative constraint of emergency authority by repeatedly "re-declaring" the same national emergency following legislative abrogation of an emergency declaration. The proposed section (3) reflects an attempt to proactively eliminate the "re-declaration" option by preventing the President from subverting legislative rejection of an emergency declaration by simply and repeatedly "re-declaring" that same emergency.

2. 50 U.S.C. § 1622(b)

Concomitant with those changes, Congress should also modify subdivision (b) of 50 U.S.C. § 1622, which requires periodic Congressional review of a national emergency declaration. At present, that subsection provides:

> Not later than six months after a national emergency is declared, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.[102]

Said more simply, § 1622(b) in its current form demands that Congress consider the propriety of a national emergency declaration no later than six months after that declaration is made. So long as that national emergency continues, Congress also must revisit that declaration and the end of every six-month period following its initial review.

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that the courts—and Congress and the public—will "know it when [they] see it." Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring) (struggling to define what is "obscene").

102 50 U.S.C. § 1622(b) (2012).

To the extent § 1622(a) is updated to attach a fast-acting "poison pill" or a short-term automatic sunset to any national emergency declaration, § 1622(b) should be changed to account for those modifications. Whereas that statute now provides that Congress must meet to consider whether to terminate a national emergency declaration no later than six months after that declaration is made, § 1622(b) should be changed to reflect that Congress must meet to consider whether an existing national emergency should be terminated every six months *after extending* a national emergency declaration through a joint resolution. Accordingly, § 1622(b) should be changed to read as follows:

> Not later than six months after a national emergency is ~~declared~~ EXTENDED BY JOINT RESOLUTION OF CONGRESS, and not later than the end of each six-month period thereafter that such emergency continues, each House of Congress shall meet to consider a vote on a joint resolution to determine whether that emergency shall be terminated.[103]

3. 50 U.S.C. § 1601

Finally, consistent with Congress's approach in 1976, any changes to the National Emergencies Act should be accompanied by a provision terminating all existing national emergencies. In enacting the National Emergency Act, Congress terminated all existing emergencies through § 1601(a) and § 1601(b), which read:

> (a) All powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, as defined in section 105 of title 5, as a result of the existence of any declaration of national emergency in effect on September 14, 1976, are terminated two years from September 14, 1976. Such termination shall not affect—
>
> (1) any action taken or proceeding pending not finally concluded or determined on such date;
>
> (2) any action or proceeding based on any act committed prior to such date; or
>
> (3) any rights or duties that matured or penalties that were incurred prior to such date.

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[103] Notably, this Article suggests no changes to the automatic termination provision of § 1622(d). Pursuant to that subsection, any declared national emergency "shall terminate on the anniversary of the declaration of that emergency if, within the ninety-day period prior to each anniversary date, the President does not publish in the Federal Register and transmit to the Congress a notice stating that such emergency is to continue in effect after such anniversary." 50 U.S.C. § 1622(d) (2012).

> (b) For the purpose of this section, the words "any national emergency in effect" means a general declaration of emergency made by the President.[104]

The changes that should be made to § 1601 are simple. They would essentially reflect updates to the Act's global "sunset" provision, and a short grace period in which existing emergency declarations could be reiterated. Those changes could take the following form:

> (a) All powers and authorities possessed by the President, any other officer or employee of the Federal Government, or any executive agency, as defined in section 105 of title 5, as a result of the existence of any declaration of national emergency in effect on ~~September 14, 1976~~ JULY 4, 2019, are terminated ~~two years~~ THREE MONTHS from ~~September 14, 1976~~ JULY 4, 2019. Such termination shall not affect—
>
> (1) any action taken or proceeding pending not finally concluded or determined on such date;
>
> (2) any action or proceeding based on any act committed prior to such date; or
>
> (3) any rights or duties that matured or penalties that were incurred prior to such date.
>
> (b) For the purpose of this section, the words "any national emergency in effect" means a general declaration of emergency made by the President.[105]

B. *The Practical Problem with the Practical Solution*

As pragmatic as the foregoing solution may be, it is not a perfect salve for the national emergency issue. The practical problem with that practical approach is of a political nature. At present, there is tension both within Congress,[106] and between Congress—which, at least in theory,

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104 50 U.S.C. § 1601 (2012).

105 The date July 4, 2019, is arbitrary, and is merely a placeholder for a date that would be chosen by Congress. The narrower grace period recommended herein—three months, as opposed to two years—is somewhat less arbitrary. The shortened time period before an existing emergency declaration terminates is designed to wipe the slate of standing emergencies clean as quickly as is reasonably possible, while at the same time affording the President a reasonable opportunity to determine which, if any, emergency declarations should be renewed following the amendment of the National Emergencies Act.

106 The Democratic Party holds a majority of seats in the House of Representatives, while the Republican Party holds a majority of seats in the Senate. *See U.S. House Election Results 2018*, N.Y. TIMES (Jan. 28, 2019, 10:38 AM), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-house-elections.html [https://perma.cc/WG7X-78WC]; *U.S. Senate Election Results 2018*, N.Y. TIMES (Jan. 28, 2019, 10:38 AM), https://www.nytimes.com/interactive/2018/11/06/us/elections/results-senate-elections.html [https://perma.cc/CU35-5XHY].

should wish to cabin the emergency authority delegated to the executive branch—and the President—who has used the cloak of emergency power to secure funding for his core campaign promise of the Wall.[107]

It may well be that Congress will struggle to agree upon a proposal to change the National Emergencies Act to retain legislative power. Democrats in the House would probably prefer to eliminate all standing national emergencies—consistent with legislative actions in 1976[108]—and start with a clean slate that delegates legislative power based on Congressional *approval* of a national emergency, rather than on the cobbling together of a supermajority to *disapprove* of a presidential veto. By contrast, it is likely that Republicans in the Senate ultimately prefer to modify the National Emergencies Act only prospectively, so as to allow President Trump to proceed with his means of funding border wall construction.[109]

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107 *See* H.R. DOC. NO. 116-22 (containing President Trump's veto message concerning the "joint resolution that would terminate the national emergency [he] declared regarding the crisis on our southern border").

108 *See generally* discussion *supra* Section IV.A.3.

109 Indeed, as this Article was under construction, fifteen Republican Senators introduced legislation proposing amendments to the National Emergencies Act that, in some respects, are consistent with those recommended herein. *See* Press Release, U.S. Senator Mike Lee, Sen. Lee Introduces ARTICLE ONE Act to Reclaim Congressional Power (Mar. 12, 2019), https://www.lee.senate.gov/public/index.cfm/2019/3/sen-lee-introduces-article-one-act-to-reclaim-congressional-power [https://perma.cc/YP3C-TKG4]. The bill contains some sound elements. For example, similar to the suggestions here, it provides for the automatic termination of a national emergency in the absence of congressional approval. ARTICLE ONE Act, S. 764, 116th Cong. sec. 2, § 201(c)(1) (as introduced, Mar. 12, 2019). The bill further smartly provides for a temporary exception to that automatic termination clause "[i]f Congress is physically unable to convene as a result of an armed attack upon the United States or another national emergency." *Id.* § 201(c)(3). In addition to enhancing presidential reporting requirements, *see id.* sec. 5, § 401(d), and confirming that approval of a national emergency declaration does not alter the proposed new national emergency review framework, *id.* sec. 4, § 203(a)(2)(G), the bill also ensures consideration of a national emergency action without the "haze" of additional issues, inasmuch as it prohibits amendments—and therefore the review of questions unrelated to the debate over the declared emergency—to the joint resolution, *see id.* § 203(a)(2)(D) (outlining the rules for consideration in the Senate); *id.* § 203(a)(2)(E) (outlining the rules for consideration in the House of Representatives).

The problems with the ARTICLE ONE Act, or the Lee Bill, however, are at least threefold, and are so significant as to likely doom passage of that measure in the Democrat-controlled House of Representatives. First, dissimilar to the approach Congress took in 1976, the Lee Bill does not provide for the termination of all existing national emergencies. To that end, Senator Lee's approach arguably is an odd one: he acknowledges the problem with respect to executive usurpation of legislative power, but does not address what some would characterize as the executive abuse that prompted his proposed amendments to the National Emergencies Act.

Second, the Lee Bill does not figuratively "lock" the "backdoor," as recommended herein. *See generally* discussion *supra* Section IV.A.1. That is, Senator Lee does not account for the possibility that an executive may create a series of "backdoor" national emergencies to circumvent congressional non-approval of such unilateral executive action. Even if Congress modifies the National Emergencies Act to automatically terminate a national emergency in the absence of congressional approval therefor, the Lee Bill leaves open the possibility that an executive may

Whether right or wrong, external factors surely will influence the calculation of whether to support a congressional effort to recapture legislative power. Assuming the unwillingness of President Trump to sign a law that defeats his ability to fund the Wall without congressional approval,[110] what should be a bipartisan effort to recapture legislative power for the legislative branch will turn on the agreement of a supermajority of members of each House sufficient to override a presidential veto. The assembly of that majority is far from guaranteed. The joint resolution to terminate the subject national emergency declaration passed the Senate by a 59-41 vote, and the House by a 245-182 tally—eight votes short of the sixty-seven required for the supermajority needed to override a veto in the Senate, and forty-five votes shy of a supermajority in the House. Given the obvious political considerations attached to the Wall question, and given that the national emergency declaration is the only tool now available to secure Wall funding over the objection of a divided Congress, those supermajorities seem to be unlikely propositions.

CONCLUSION

The Supreme Court's decision in *Youngstown Sheet & Tube Co. v. Sawyer*[111]—one of the seminal cases on the extent of executive power—was accompanied by a concurring opinion by Justice Robert Jackson that perhaps is even more prescient now than it was then. Justice Jackson, of course, served as United States Solicitor General, United States Attorney

repeatedly declare the same national emergency, thereby requiring Congress to repeatedly act to thwart executive usurpation of legislative authority. That scenario is particularly concerning in the event of a national emergency declaration made during a period of congressional recess; as the Lee Bill acknowledges, in such a scenario, it may be that Congress could not immediately act to defeat a presidential declaration of a national emergency unless the *President* convened Congress. *See* S. 764, sec. 4, § 203(a)(2)(B).

Third, the Lee Bill does not provide for the termination of any contracts for construction executed pursuant to the President's emergency authority if such construction has commenced before the termination date of the subject national emergency. *See id.* sec. 3, § 202(b)(1)(C). Consequently, under the Lee Bill, a fast-acting President may contract for the erection of structures she believes address a declared national emergency—for example, a border wall addressing what President Trump believes to be a present-day national emergency pertaining to illegal immigration, or a series of "green energy" production devices a future president may believe addresses a national emergency pertaining to climate change. Accordingly, under the Lee Bill, so long as work pursuant to those construction contracts begins before Congress can stop it, such contracts cannot be terminated, and the "emergency" construction ultimately rejected by Congress may be allowed to continue.

110 *See* Tim Lau, *Trump Vetoes After Congress Rejects Border Emergency*, BRENNAN CTR. FOR JUSTICE (Mar. 14, 2019), https://www.brennancenter.org/blog/senate-rejects-trump-emergency-declaration-border-wall [https://perma.cc/EK9S-W6PU].

111 343 U.S. 579 (1952).

General, the Chief United States Prosecutor at the Nuremburg Trials in 1945 and 1946, and as an Associate Justice of the United States Supreme Court.[112] These roles gave him a unique combination of experiences at the highest levels in United States government and with the depths of tyranny that was Nazi Germany.

His concurrence in *Youngstown* began with a warning: "comprehensive and undefined presidential powers hold both practical advantages and grave dangers for the country."[113] "The tendency" with such powers, Justice Jackson noted, "is strong to emphasize transient results upon policies . . . and lose sight of enduring consequences upon the balanced power structure of our Republic."[114]

Indeed, "the Constitution diffuses power the better to secure liberty,"[115] likely as a result of the forefathers' experience with "the prerogative exercised by George III,"[116] and Jackson thought it unlikely that the Framers of the Constitution "were creating their new Executive in his image."[117] The Constitution's grant of the "title Commander-in-Chief of the Army and Navy" to the President did not concomitantly "constitute him also Commander-in-Chief of the country . . . and its inhabitants."[118] And, Jackson suggested, "emergency powers are consistent with free government only when their control is lodged elsewhere than in the Executive who exercises them."[119]

At bottom, any dispute with respect executive usurpation of legislative authority goes to "[t]he essence of our free Government," which Justice Jackson aptly described as "leave to live by no man's leave, underneath the law."[120] That is, we are "to be government by those impersonal forces which we call law."[121] Nobody was better positioned than Justice Jackson to recognize that the best—and perhaps only—"technique for long preserving free government" is to ensure "that the law be made by parliamentary deliberations," and "that the Executive be under the law."[122]

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112 *See Robert H. Jackson, 1941–1954*, SUPREME COURT HISTORICAL SOC'Y, http://supremecourthistory.org/timeline_robertjackson1941-1945.html [https://perma.cc/6LA4-Q7H4] (last visited May 17, 2019); *see also Nuremberg Trial, International Military Tribunal, 1945–1946*, ROBERT H. JACKSON CTR., https://www.roberthjackson.org/nuremberg-timeline [https://perma.cc/93GC-Z7MU] (last visited May 17, 2019).

113 *Youngstown*, 343 U.S. at 634 (Jackson, J., concurring).

114 *Id.*

115 *Id.* at 635.

116 *Id.* at 641.

117 *Id.*

118 *Id.* at 643–44.

119 *Id.* at 652.

120 *Id.* at 654.

121 *Id.*

122 *Id.* at 655.

Misappropriation of the "law" historically has enabled and fueled despotism, including Nazi Germany, with which Justice Jackson became all too familiar. No matter one's view of the Wall debate, it is nearly impossible to dispute that the President's controversial declaration of a national emergency with respect to the situation on the southern border has brought to light an inherent, significant problem with the National Emergencies Act: legislative power is easily delegated to the executive branch, but not easily recovered from it. That unintended consequence is one that invites abuse and threatens democracy. Hopefully it is one that, somehow and someday soon, will be the subject of meaningful and effective bipartisan reform.